



HR CORNER

FEES & BURGESS, P.C.



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OPPOSING COUNSEL MAY CONTACT NON-MANAGERIAL EMPLOYEES OF ORGANIZATION INVOLVED IN LITIGATION

The Office of the General Counsel of the Alabama State Bar recently released an ethics opinion determining that attorneys may communicate with non-managerial employees of an organization involved in current or pending litigation, provided that the employees contacted did not participate in the conduct underlying the litigation and do not have authority to make decisions regarding the litigation.

Pursuant to Rule 4.2 of the Rules of Professional Conduct of the Alabama State Bar, in representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. In the case of an organization, the comments to Rule 4.2 provide that an attorney may communicate directly with an employee of a corporation or other organization who is the opposing party in pending litigation without the consent of opposing counsel if the employee does not have managerial responsibility in the organization, has not engaged in conduct for which the organization would be liable, and is not someone whose statement may constitute an admission on the part of the organization.

There is a significant difference of opinion across jurisdictions as to which employees fall within the third category, namely those employees whose statement may constitute an admission on behalf of the organization. For example, some jurisdictions take the position that this category includes all employees of a corporation, as any statement given could be considered an admission. Other jurisdictions prohibit communications with a "control group," or a company's highest-level management.

To answer the question for Alabama, the Office of the General Counsel turned to a recent decision of the Massachusetts Supreme Judicial Court. In Messing, Rudavsky & Weliky, P.C., v. President and Fellows of Harvard College, 764 N.E.2d 825 (2002), plaintiff's attorney interviewed five employees of defendant, two of whom had supervisory authority over plaintiff. The Court determined that the third category of protected employees, employees whose statement may constitute an admission on behalf of the organization, were those employees who have authority on behalf of the organization to make decision about the course of the litigation. To include all employees of an organization would be overly protective of the organization and too restrictive of an opposing attorney's ability to contact and interview employees of an adversary organization.

The Office of the General Counsel adopted this position and concluded that attorneys are not prohibited from contacting lower-level employees who do not exercise managerial responsibility in the matter, who did not engage in conduct for which the organization could be liable, and who do not have authority on behalf of the organization to make decisions about the course of the litigation. However, when approaching an unprotected employee, an attorney must inform the employee that the attorney represents a client with a claim against the organization.

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The employee may then express his or her desire to terminate the conversation, which the attorney is ethically obligated to respect and immediately discontinue any further attempt at communication. Employers should be aware that opposing counsel may attempt to contact their employees regarding current or pending litigation if they are not protected by one of the categories above. However, employers may shield their employees from such encounters by informing the employees that they may end the conversation if so confronted.

FEES & BURGESS, P.C. - Calendar of Events

Fees & Burgess, P.C., is proud to present, and participate in the presentation of, the following upcoming seminars:

Immigration Law Update

August 10, 2011; 11:30 AM to 1:00 PM

Muscle Shoals, Alabama

The Shoals Chamber of Commerce, through its member Fees & Burgess, P.C., is offering a 90 minute presentation summarizing the most controversial law passed in the state in years, the Beason - Hammon Alabama Taxpayer and Citizen Protection Act (HB 56). It has been hailed as a necessity to prevent "economic hardship" and "lawlessness" in the state, and condemned as inviting "rampant exploitation of immigrants." Find out the facts, and how it affects state government and municipalities, individuals, and businesses who must begin to comply with the law September 1st. This informative program will discuss new prohibitions, requirements, obligations, as well as new and enhanced penalties for failure to comply. In addition, attendees will receive informed guidance regarding potential challenges to the new law, as well as practical responses to the many changes and requirements of the law.

For more information, or to register, please visit the Shoals Chamber of Commerce website [here](#).

This program has been approved for 1 (General) recertification credit hours toward PHR, SPHR and GPHR recertification through the HR Certification Institute, for more information about certification or recertification, please visit the HR Certification Institute website at www.hrci.org.

Service Contract Act

September 22, 2011

Jackson Conference Center Research Park; Huntsville, Alabama

At Solvability's 5th annual Rocket City GovCon Conference, Jeff Roth, of Fees & Burgess, P.C., will be presenting a special session on the Service Contract Act. This session will focus on applicability; general requirements; wage and fringe benefit payment requirements; recordkeeping and notice requirements; predecessor contractor issues; and problems and penalties.

To register, or for more information, please click [here](#) to visit Solvability's website.

For more information on these, and other upcoming events, please visit us online at www.feesburgess.com.

EDUCATIONAL OPPORTUNITIES

During these rough economic times, it is important to get the most for your money. The lawyers of Fees & Burgess, P.C., have extensive experience working in a variety of fields, as both in-house and private counsel, representing various clientele. Our attorneys have diverse experience in many areas of law, including civil litigation; employment law; intellectual property; supply chain management; mergers and acquisitions; contract negotiation; dispute resolution; and various other fields.

This wide field of knowledge provides our attorneys with the insight and know-how to provide quality training on various topics. Our programs can be customized to fit any business need while keeping the costs of our training competitive, and without sacrificing quality.

Topics that Fees & Burgess, P.C., can provide training on include, but are not limited to:

A Recession Era Guide to Collecting on Construction Contracts	Managing Gender Identity Issues in the Workplace
Conducting Effective Workplace Investigations	Negotiation and Resolution of Federal Contract Claims
Construction Contracting	Privacy in the Workplace
Contingent Employees and Labor Outsourcing	Reducing Employee Benefits Costs for Alabama Businesses
Diversity Training	Reducing Risk in Purchasing Terms and Conditions
Elements of an Electrical Manufacturing Services Contract	Reduction in Workforce Strategies
Employment Law Survival Training for Managers	Retaliation and Whistleblowers
Family Medical Leave Act	Uniform Commercial Code: Primer to Articles 1, 2, and 2A
Hiring and Firing	Violence in the Workplace
Immigration Compliance	Wage and Hour Issues/Fair Labor Standards Act
Incoterms® 2010	Americans with Disabilities Act
Indemnity and Limitation of Liability Contract Clauses	Managing Employee Use of Internet and E-mail in the Workplace
International Contracting	Ethics, Business Conduct and Compliance in Government Contracting
Limiting Liability for Sexual Harassment	

For more information on these and other programs, please visit us online at www.feesburgess.com; contact us by e-mail at seminars@feesburgess.com; or by phone at (256) 536-0095.



SPEAKERS

FEES & BURGESS, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, contact seminars@feesburgess.com.

NEWSLETTERS

FEES & BURGESS, P.C., also publishes *F&B Quarterly Bytes*, focusing on multiple practice areas; and *F&B SCM Memo*, focusing on the supply chain management industry. To receive any of these newsletters, please e-mail newsletters@feesburgess.com with your contact information.

To remove your name from our mailing list, please e-mail newsletters@feesburgess.com.

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“No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”